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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court (App. II of the Petition) are not yet officially reported. The opinion of the Court of Appeals (App. I of Petition) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where the police searched residential premises pursuant to a search warrant issued on an affidavit which did not show probable cause, may the suppression remedy be withheld because of additional police information introduced at the suppression hearing which is merely cumulative of the contents of the affidavit already held to be defective?

2. May the suppression remedy be denied on the grounds that police were acting in good faith in making the search, even though they acted in contravention of Constitutional standards, in a case where they had no probable cause to believe that seizables were on premises, where no emergency situation existed requiring immediate action, and where the testimony of the police officers demonstrates that in making the search they acted on nothing more than a hunch?

3. May the suppression remedy be withheld on the grounds that a search was reasonable in a case where police entered and searched residential premises with a defective affidavit, without probable cause to believe that a seizable was on the premises, and where no emergency situation existed where life or property was threatened?

4. Where the Supreme Court of a state has held that a search was lawful because the warrant pursuant to which it was conducted was validly issued, should a United States District Court having found the warrant invalid remit a petitioner for habeas corpus to the state courts to litigate the validity of alternative justifications of the search already presented to the State Supreme Court but not decided by it?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional provisions and statutes are contained in the Petition at pages 4 - 8.

STATEMENT OF THE CASE

Respondent Rice is at present detained at the Nebraska Penal and Correctional Complex where the petitioner is the warden. He is there pursuant to a jury verdict of guilty and judgment and sentence to a term of life imprisonment pronounced upon him by the District Court of Douglas County, Nebraska on April 17, 1971. The jury found Rice guilty of the crime of first degree murder. The killing involved was the killing of Larry D. Minard, Sr., a member of the Omaha Police Department. Minard was killed on August 17, 1970, while making a police call. While on the premises where the call was being investigated, he was killed when a bomb exploded. The conviction of Rice was affirmed by the Supreme Court of the State of Nebraska on July 14, 1972 in an opinion reported at 188 Neb. 728, 199 N.W.2d 480 (1972).

After Rice's conviction was sustained in the state courts, he sought habeas corpus in the United States District Court for the District of Nebraska. Rice's attack on his conviction as constitutionally improper was bottomed on a claim that the products of two unconstitutional searches were admitted in evidence against him. The first search involved the search and seizure at his residence at 2816 Parker Street in Omaha, Nebraska on August 2, 1970. The second search involved the seizure and subsequent chemical

examination of his clothing conducted on and after August 27, 1970, the date upon which he was arrested. Ultimately, the United States District Court accepted Rice's argument and granted the writ, directing his release unless he be tried within 90 days after the order became final and no longer subject to review. On the State's appeal, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court.

The search and seizure issue arose in the following way. Minard, and other police officers who accompanied him, had gone to a home in Omaha as a result of a call on the police emergency number which reported a woman screaming at a residence at 2865 Ohio Street in Omaha. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Sometime after the initial entry, Minard approached the suitcase and while he inspected it it exploded, killing him.

The police immediately began an investigation of the crime. After a time, they obtained evidence that Duane Peak, a member of the National Committee to Combat Fascism, a political organization known in the community as the Black Panthers, had been involved in the crime. Specifically, they received information that it was Peak

who had made the call regarding the disturbance. They also obtained evidence that Peak had sometime prior to the murder been seen with a suitcase similar to the one used.

The police also had information that Edward Poindexter, another officer of the NCCF, was capable of rigging a booby trapped bomb.

The police intelligence squad was familiar with the operations of the NCCF. For some time prior to the death of Minard they had developed a file on this organization. The file included publications of the NCCF, some of which contained articles by Poindexter or by Rice advocating violence against the police.

On Saturday afternoon, August 22, arrest warrants were issued for Peak and Poindexter. The Omaha police began a search for the two suspects.

The police constructed a list of different places where they thought Peak might be. The first of these places was the headquarters of the NCCF. A large number of officers converged there and searched those premises. An arrest was made at those premises. After the officers who made the search and arrest at the headquarters returned to the police station, they were subdivided into smaller parties and were instructed by Lt.

Perry to "proceed with their previously assigned houses." (Federal Court Transcript, Perry testimony, pages 78-79). As Lt. Swanson, another officer, describes the instructions that were given, they were ordered "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (Federal Court Transcript, page 32).

The police had knowledge that Duane Peak, who they were seeking, was a member of the NCCF. Rice was also a member of that organization and one of its officers. His house had been a periodic meeting place for NCCF members. Peak was one of the members of the organization who had visited at Rice's house. The officers therefore went to Rice's house at 2816 Parker Street in search for Peak. At the time police arrived at Rice's house, Poindexter, the other party for whom they had an arrest warrant, had already been under arrest for several hours.

At 10:30 the police arrived at Rice's home. They found the lights and the television on, but received no response to a knock at the door. The leaders of the police team, Lt. (then Sgt.) Swanson and Lt. (then Sgt.) Pfeffer decided not to forcibly enter the house. Rather they decided to obtain a search warrant for Rice's home. As Lt. Swanson explained:

"Well one thing that had been troubling me all day, since the search of the Black Panther Headquarters, is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'why don't we check this house for Duane Peak and we may find some dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (Federal Court Transcript, page 42).

The two command officers then returned to the police station, where they prepared an affidavit for a search warrant. The affidavit consisted of three allegations. The first two, which rested upon the knowledge of the officers, were that:

"1. David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.

"2. A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCF."

The third averment was based upon hearsay, it was that:

"We have been told in the past that Rice keeps explosives at his residence, and also illegal weapons, which he has said should be used against police officers."

The tip, alleged in the affidavit, had been received by the police at least several weeks, and possibly several months, before the application for the search warrant. This fact, however, was not revealed to the magistrate. The tip was much less positive than the affidavit indicated. As Lt. Swanson testified in state court, "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that they might store it."

In addition to the information contained in the affidavit, the police had certain other information, which they introduced in the state court suppression hearing. This information is summarized by the Supreme Court of Nebraska in its opinion at 188 Neb. 738-739, 199 N.W.2d 487-488. It consisted of the following:

"It is worthy of mention that in connection with the search for explosives and devices at 2815 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a statement to the police. This

directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters 'to lay low.' (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, ' . . . the action was a week late.' The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and delined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing 'directions on how to make bombs'."

After obtaining the search warrant, at about 11:30, the two police officers returned to Rice's home and an entrance was made. In a box in the basement, the police found 14 sticks of dynamite. They also found blasting caps, wiring, battery, and a pair of long-nosed pliers.

Peak was subsequently arrested, and on August 27, Rice voluntarily surrendered himself. Rice was placed under arrest for unlawful possession of an explosive substance. His arrest was based solely upon the items seized by the police at 2816 Parker Street on August 22, 1970.

The clothing Rice was wearing at the time of his arrest was seized by the police and subject to chemical analysis for dynamite particles. Such particles were found.

In the state courts, Rice sought suppression of the evidence at 2816 Parker Street and the results of the examination of his clothing as fruits of that search. His principal contention was that the affidavit upon which the warrant was based was fatally defective. The State introduced evidence to supplement the allegations of the affidavit. In addition, it sought to justify the search on the grounds of the existence of exigent circumstances and because of police possession of the warrant for Peak. Both the Nebraska trial court and the Supreme Court found the affidavit sufficient. However, the Nebraska Supreme Court alternatively held that the allegations of the affidavit could be supplemented by additional evidence, and that the additional evidence demonstrated probable cause.

In the federal habeas corpus proceeding, the District Court in an opinion filed March 30, 1974, held that the affidavit was fatally defective and did not demonstrate probable cause. The Court also held that the affidavit could not be supplemented with the additional information introduced in the state suppression proceeding in order to make out a case of probable cause.

The State had made little or no effort to support its exigent circumstances and arrest warrant justifications for the search. The District Court offered the State an opportunity to so supplement the record.

The State's evidence in the District Court was primarily devoted to the question of whether or not the police had probable cause to believe that Peak was at Rice's house when they went there. The police testimony demonstrated that there was no cause to believe that Peak was at Rice's house. They had no reports of Peak being at Rice's house. He had not been seen in the vicinity of Rice's house. The only basis for seeking him there was that he was a member of an organization to which Rice belonged.

After the supplemental hearing the District Court held that the State had not demonstrated that the police had probable cause to believe that Peak was in Rice's house when they made their entrance. The District Court also held that no exigent circumstances existed which would have justified the police search without a warrant and that, in any event, the police had no probable cause to believe that any seizable was in the house at 2816 Parker Street when they made their entrance.

The Court of Appeals affirmed the District Court decision on all of the issues raised.

In the net then, the facts of this case were that the police had no evidence indicating that Rice was involved in the killing of Minard at the time his house was searched. They did have evidence that he was a member of the RCCF and one of its officers. They had evidence that he might have made statements threatening to police officers. They had evidence that two other members of the organization were involved in the killing. They had a stale tip that dynamite might be on Rice's premises, which tip was totally uncorroborated. They had no information that Peak was at Rice's house. No emergency existed, as is demonstrated by the fact that the police delayed for one hour before making entrance into Rice's house, and during that hour took no steps to protect the neighborhood. Yet though there was no emergency, though there was no evidence of Rice's involvement in any crime, though there was no probable cause to believe that either a seizable person or seizable things were within Rice's home, the police made entrance into his home and proceeded to search it. Because of the total want of any preexisting justification for entrance into Rice's home, the District Court and the Court of Appeals found

that entrance unlawful and Rice's trial constitutionally infirm because the things found within the house and the fruits of those things had been admitted against him in his state court trial.

ARGUMENT

I

THE STATE DOES NOT CONTEST THAT THE COURTS BELOW PROPERLY APPLIED THE EXCLUSIONARY RULE IN THIS CASE. RATHER, IT SEEKS MODIFICATION OF THE RULE. HOWEVER, THE CHANGES IN THE RULE WHICH IT SEEKS HAVE NO RELEVANCE TO THE ACTUAL FACTS OF THIS CASE. NONE OF THE PROPOSED MODIFICATIONS OF THE EXCLUSIONARY RULE WOULD SAVE THE SEARCH HERE. IN ANY EVENT, THE PROPOSED MODIFICATIONS WOULD SUBSTANTIALLY THWART THE OPERATION OF THE EXCLUSIONARY RULE. SINCE THE CORRECTNESS OF THE DECISIONS BELOW IS NOT CONTESTED, AND SINCE THE FACTS OF THIS CASE DO NOT SUPPORT THE MODIFICATIONS OF THE EXCLUSIONARY RULE WHICH THE STATE SEEKS, THE WRIT SHOULD BE DENIED.

The District Court and the Court of Appeals held that the affidavit upon which the search warrant for Rice's premises was issued did not show probable cause. The State does not contest those holdings. The District Court and the Court of Appeals held that the police did not have probable cause to believe that Duane Peak for whom they had an arrest warrant was concealed on Rice's premises. The State does not contest those holdings. The District Court and the Court of Appeals held that the police did not have information independent of the affidavit for the

search which demonstrated probable cause to believe contraband was hidden on Rice's premises. The State does not contest those holdings. The District Court and the Court of Appeals held that no emergency situation existed which might have justified police action otherwise in contravention of constitutional standards. The State does not contest those holdings.[1]

1. The State's argument is that if the Exclusionary Rule is not modified in this case a murderer will be released. What was found on Rice's premises and in his clothing was dynamite and dynamite particles. The possession of dynamite alone does not prove murder. If the State's argument that suppression here will secure Rice's release is correct, it is because the State did not have an adequate first degree murder case.

The actualities of the State's case are different than its brief suggests. Rice was convicted upon the testimony of Duane Peak, the youth who actually planted the bomb. The evidence suppressed here was used to corroborate his testimony that Rice had aided in the construction of the bomb and had retained it in his home until it was taken for use.

The case turned upon the credit which the jury gave to Peak's testimony v. Rice's testimony denying involvement. Peak's story about Rice was not consistently told. Other witnesses contested some of its details. Peak's testimony was procured by the State under circumstances suggestive of a deal. Subsequent to the conviction of Rice, Peak was processed as a juvenile delinquent rather than a felon.

Thus, the State is not deprived of the opportunity to retry Rice by the application of the exclusionary rule. On the other hand, the State's case is not so overwhelming as to make a second jury verdict a foregone conclusion. Rather, a second trial would take place in a context less emotionally than the first. Thus, no miscarriage of justice results from the application of the Exclusionary Rule in this case.

The decisions of the courts below involved a straight-forward application of existing learning under the Exclusionary Rule. The correctness of those decisions under present law is not contested. Rather, the State of Nebraska argues that this case presents the Court with an appropriate vehicle for modification of the Exclusionary Rule. It suggests three possible modifications of the Rule which it believes would save its evidence here from suppression.

The three modifications which Nebraska suggests in order to save its case are that:

1. The Exclusionary Rule should be modified to allow the admission of evidence seized under a warrant issued upon a defective affidavit, if the police officers who executed the warrant had information not contained in the affidavit which showed probable cause to search;

2. That evidence should not be suppressed if the police officers who seized it acted in subjective good faith, even though they may have violated Constitutional standards, or in other words, that suppression should be made contingent upon an intent by police officers to violate the Constitution; and

3. That if a search is conducted in a reasonable manner, even though police officers did not have cause to

believe that seizables were on premises when they made entry, evidence found on the premises should not be suppressed.

The gravest difficulty with each of the State's proposed modifications of the Exclusionary Rule, as we will demonstrate, is that the facts of this case do not come within any of the proposed exceptions. Moreover, each of the proposed exceptions would substantially emasculate the Exclusionary Rule.

This case must be viewed in the context of a continuing need for the Exclusionary Rule. Nebraska asks for its modification, not its abolition. Moreover, the State points to no effective alternative remedy which could perform the task now assigned the Exclusionary Rule, that is deterring invasions of the Fourth Amendment protected right of privacy. The modifications Nebraska requests must be evaluated in the context for continuing the Exclusionary Rule. Would the modifications advance or hinder the performance of the task still assigned to the Exclusionary Rule? We believe that an examination of the proposed modifications will demonstrate that they would substantially thwart the Exclusionary Rule.

The State prefaces its argument in support of its proposed modifications of the Rule with a wide-ranging attack on the merits of the Exclusionary Rule. Since it

does not request abolition of the Rule, we do not reply in detail to its assault on the Exclusionary Rule. Nevertheless, we briefly reply to the State's argument insofar as it is relevant to the merits of the State's case for modification of the Rule.

The State's attack on the Exclusionary Rule contains two flaws. The first is the failure of the State to come to grips with the importance of Fourth Amendment rights. It is easy to denigrate the Exclusionary Rule by focusing solely on the social costs of retaining it, while ignoring the value of the rights it protects. The second flaw in the State's argument is related to the first. Unless the privacy which the Fourth Amendment protects is deemed without value, it must be protected against invasion. Currently the only effective remedy for violation of Fourth Amendment rights is suppression of evidence. Without the Exclusionary Rule, Fourth Amendment rights become rights without remedies. Rights without remedies are not rights at all.

This case involves an invasion of a private home. The sanctity of the home lies at the root of the values the Fourth Amendment protects. Wyman v. James, 400 U. S. 309, 316-317 (1971). The Amendment protects privacy.

The home is a man's private place. Its boundaries define a sphere of influence within which a person may be himself and express himself secure from the intrusion of the uninvited. In a predominately urban society, the propinquity of others forces on all the character of public person. Opportunity to retreat from public roles and rest from public performance is a necessity of meaningful existence in such a world. The opportunity to retreat and rest depends on the sense that the home is a bounded sanctuary. In applying the Exclusionary Rule to condemn an unwarranted invasion of a home, and hopefully to deter future invasions, the courts below defended the core of the the privacy that the Fourth Amendment protects.

This brings us to our second point. Whatever the merits or demerits of the exclusionary rule, it is the sole protector of Fourth Amendment rights. Its abolition prior to the creation of a new guardian creates two intolerable dangers. Firstly, as the Chief Justice observed in his dissenting opinion in Bivens v. 6 Unknown Federal Narcotics Agents, 403 U.S. 388, 420-421 (1971):

> ". . . In a sense our legal system has become the captive of its own creation. To overrule Weaks and Map, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain

the impression, however erroneous, that all constitutional restraints on police had somehow been removed--that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."

The second danger is related to the first. The exclusionary rule is unpopular with the public. Yet, that unpopularity paradoxically is an expression of public faith in the values the Fourth Amendment protects. In a large measure, the public call for "law and order" reflects a fear that people are no longer safe in their own homes. While abolition of the Exclusionary Rule might aid in quieting these fears, abolition without appropriate alternative could replace the fear of intrusion of the wrongdoer by fear of unwarranted intrusion of the police. When the home is no longer perceived as a sanctuary, it is no longer a home.[2]

2. The State suggests that the abolition of the doctrine of sovereign immunity in Nebraska by the Political Subdivision's Torts Claims Act, Sec. 23-2401, et seq., Neb. R.R.S. and the State Tort Claims Act, Sec. 81-8,209, et seq., Neb. R.R.S. provides an alternative remedy. However, it is far from clear that the statute would reach police conduct offensive to the Fourth Amendment. Both acts exclude liability where a discretionary function is involved and both preclude liability for assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process. Sec. 23-2409 (2) (5) and Sec. 81-8,219 (1) (a) (d). Nebraska should be required to present the Court with a working alternative to the exclusionary rule before it requests permission to be freed of its strictures.

A. TO ALLOW SUPPLEMENTATION OF A DEFECTIVE AFFIDAVIT FOR A SEARCH WARRANT AT A SUBSEQUENT HEARING ON A MOTION TO SUPPRESS WOULD AMOUNT TO AN ELISION OF THE WARRANT CLAUSE FROM THE FOURTH AMENDMENT. IN ANY EVENT, THE ADDITIONAL INFORMATION UPON WHICH THE STATE RELIES DOES NOT ESTABLISH PROBABLE CAUSE.

The State argues that the Exclusionary Rule should be modified to allow the police to supplement a defective affidavit for a search warrant at the hearing on the motion to suppress. The State's argument suffers from two fundamental vices. Firstly, the State completely ignores the warrant clause of the Fourth Amendment, and hence the central role which the magistrate plays in the protection of Fourth Amendment rights. Secondly, the State's position is that such a modification of the Exclusionary Rule would save the search here. That premise is factually incorrect. The additional information produced in the state court hearing on the motion to suppress does not demonstrate the existance of probable cause to believe that dynamite was on the premises at 2816 Parker.

(1)

"Searches conducted outside the judicial process without prior approval by the judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established well delineated exceptions." Katz v. United States, 389 U.S. 347, 357

Unless time is too short for officers to procure a warrant, they are generally required to have a warrant before they may intrude into a constitutionally protected area. Roaden v. Kentucky, 413 U.S. 496, 505 (1973); Coolidge v. New Hampshire, 403, U. S. 443, 462 (1971). Before a magistrate may issue a search warrant, probable cause must be shown to him. Even if the officer applying for the warrant had probable cause, unless he informed the magistrate of that cause, the warrant and ensuing search is invalid. Whitley v. Warden, 401 U.S. 560, 565. fn.8 (1971); Spinelli v. United States, 393 U.S. 410, 413 fn.3 (1969).

The limitation of the suppression hearing to the affidavit for the warrant is a derivative of the requirement of a warrant. The warrant is required in order to assure disinterested review of police information before an invasion of privacy takes place. United States v. United States District Court, 407, U.S. 297, 315-317 (1972). If the magistrate's role is to be meaningful, the justification for the search must be limited to the information presented to him. If that information can be supplemented, the procurement of the warrant becomes mere ritual and the magistrate is reduced from judge to ceremonial figure. The requirement of the warrant derives directly from the second clause of the Fourth Amendment. Thus, the limitation

of the justification to the information presented to the magistrate is bottomed in the Fourth Amendment. The modification of the Exclusionary Rule the State requests amounts to a modification of the Fourth Amendment as this Court recognized in the United States v. United States District Court, supra.[3]

(2)

However, the modification the State seeks would not save its case in any event. The additional information presented in the state court suppression hearing demonstrated

3. The State's argument rests on a confusion between searches and arrests in the original opinion of the Nebraska Supreme Court in this case, State v. Rice, supra 188 Neb. 739, 199 N.W. 2nd 488, which the court later repeated in State v. Dussault, 193 Neb. 122, 225 N.W. 2nd 558 (1975). A warrant is not required for an arrest, and thus, when an arrest is challenged the issue is whether probable cause to arrest existed at the time of arrest, rather than when a warrant was sought. The affidavit is not supplemented, rather the arrest may be validated independently of the warrant. The basis for the distinction between arrests and searches is that an arrest need not invade a constitutionally protected area. When an arrest requires an invasion of a constitutional protected area, an arrest warrant and in some circumstances a search warrant would be required. Then, the limitation of justification to information presented to the magistrate would attach. See United States v. Dorman, 435 F 2nd 385 (DC Cir. 1969); United States v. Shye, 492 F 2nd 886 (6 Cir. 1964); United States v. Phillips, 497, F 2nd 1131 (9 Cir. 1974); Government of Virgin Islands v. Gereau, 502 F 2nd 914 (3rd Cir. 1974). Conversely, if property may be seized without invasion of privacy, the requirement of a warrant does not apply. Hester v. United States, 265 U.S. 57 (1924). Thus, the supposed inconsistency in Fourth Amendment learning that Nebraska seeks to have resolved does not exist.

that the tip on which the police acted was even less substantial than the affidavit indicated. In addition, it demonstrated that the tip was stale. None of the additional facts presented in the suppression hearing went to establish the presence of seizables at Rice's residence.

The District Court had available to it the testimony in the state court. With regard to the additional evidence concerning the tip, a matter to which the Nebraska Supreme Court did not avert, the District Court noted:

> " . . . The source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as 2½ months prior to the entry of Rice's house. Moreover the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to supress in the state criminal trial, Lt. (then Sgt.) Swanson testified as follows concerning the tip: 'I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places they might store it.' "
>
> Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip." (Memorandum and Order of July 5th).

The tip itself was weakened rather than strengthened by the additional evidence. Instead of the positive averment in the affidavit "We have been told in the past that Rice keeps explosives, at his residence . . ." the tip now becomes "David Rice's house would be one of the places they might store it."

The original affidavit for the search warrant did not indicate when the tip had been received. Swanson's testimony at the hearing on the motion to suppress shows that it was at least several weeks, and possibly several months old. After the hearing on the motion to suppress, the tip runs afoul of the rule that in order to justify a finding that property is probably upon the premises to be searched, the information "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932).

The other information in the hearing on the motion to suppress, which the Nebraska Supreme Court used to buttress the defective affidavit, 188 Neb. 738-739, 199 N.W.2d 487-488, merely supports the accuracy of the averments in the affidavit that:

> "(1) David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> (2) A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCP."

However, these two averments were not rejected by either the District Court or the Court of Appeals. Rather, both Courts held that the averments were insufficient to demonstrate probable cause to believe that dynamite was on Rice's premises or to corroborate the tip. Thus, the Court of Appeals stated:

> "The averments of the affidavit that petitioner was a member of the NCCF and that the NCCF members had already been arrested in the case possibly enhanced the suspicion that petitioner in some way was involved in the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in petitioner's house."

Similarly, the district court held:

> " . . . In Rice's case, the averment that he is a member and minister of information of the NCCF which advocates the violent killing of police, that a policeman had been killed, and that arrests had been made from the membership of the NCCF, in no way suggests that dynamite would probably be stored at the petitioner's house. Perhaps such averments made it more likely that dynamite would be found in Rice's house than the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is Constitutionally protected free speech. Yates v. United States, 354 U.S. 298, 318-319 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not imply that the dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. Brinegar v. United States, 338 U.S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is minister of information. Being minister of information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice is weapons minister or something of that sort, it would heighten the inference down to a particular place. The key failing of the averments, then is that they fail to tie down the storage of dynamite to any particular place. Such particularity is required before a search warrant may issue." (Memorandum and Order of March 29).

The additional information on which the State Supreme Court relied is essentially an elaboration of the basic allegations of the affidavit with regard to Rice's membership in the group and the involvement of members of the group in the killing. It suffers from the same defect as the affidavit itself, that is the failure "to tie down the storage of dynamite to any particular place." If the affidavit could be supplemented as the State requests, the result in this case would not be changed. The additional information which the State pressed upon its own courts, and which the Federal Courts refused to consider, does not demonstrate the probable cause lacking in the affidavit.

B. TO MAKE THE OPERATION OF THE EXCLUSIONARY RULE DEPEND ON THE SUBJECTIVE MIND STATE OF THE POLICE OFFICERS, AS THE STATE REQUESTS, WOULD RENDER THE EXCLUSIONARY RULE MEANINGLESS. IN ANY EVENT, THE EVIDENCE HERE DEMONSTRATES THAT THE POLICE DID NOT ACT IN SUBJECTIVE GOOD FAITH.

The State argues that evidence should not be suppressed though a search was unlawful if the police were proceeding in good faith at the time the search was made. The State does not define the concept of good faith it desires to have applied. However, from the argument it makes, it may be inferred that its notion of good faith encompasses a situation in which the police officer believes that he is acting within the law even though that belief is not reasonable when measured by an objective standard.

(1)

The State purports to find support for this good faith test in Michigan v. Tucker, ___ U. S. ___, 41 L.Ed.2nd 182 (1974); and United States v. Calandra, 414 U.S. 338 (1974). The State's argument rests upon a fundamental misreading of these cases. Both Michigan v. Tucker and United States v. Calandra, bottom the exclusionary rule upon deterance. Obviously, the breach of constitutional rights to be detered is never the one involved in the suppression proceeding. That violation has already taken place. The deterance is aimed at the subsequent conduct of the officers involved in the proceeding and the the conduct of other officers.

A good faith standard is antithetical to this deterance purpose. Under the State's standard, an officer who never bothered to find out that the Fourth Amendment existed could never violate it. Beyond that, when the subjective mind state of the officer becomes the test, he is encouraged to act in contravention of objective standards in the hope he can pursuade a judge he thought he was doing right. Thus, the State's good faith test defeats the purpose of exclusion announced in the authorities upon which it relies.[4]

(2)

The State's argument for the application of a good faith standard in this case is destroyed by the testimony of the police officers in the federal habeas proceeding.

4. The State's argument totally misconstrues the two cases. Calandra dealt with the added deterance value of preventing use of evidence in a grand jury proceeding, which could not be used at trial. Michigan v. Tucker, dealt with the suppression of fruits of a confession itself inadmissable. Neither case purports to indicate objective standards may be departed from when the immediate fruits of a wrongful invasion of privacy are the object of the suppression proceedings.

Further, the "good faith" referred to in Michigan v. Tucker, was objective good faith. The officers had complied with existing case law. After the confession had been obtained, Miranda v. Arizona, 384 U.S. 436 (1966) was decided, but under the holding of Johnson v. New Jersey, 384 U.S. 719 (1966), Tucker's confession fell within the retroactive reach of Miranda. The obvious point, which Michigan v. Tucker makes, that deterance is not served by retroactive change of rule cannot be transmutted into the unsound proposition that objective standards are inconsistent with deterance.

The officers did not entertain a belief that dynamite would be found on Rice's premises or that Duane Peak was secreting himself there. The police did not expect to find either dynamite or Peak at Rice's house. All they had was a hope.

Lt. Swanson, the officer who obtained the search warrant, testified:

> "Well, one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (Federal Court transcript, p. 42).

Swanson's testimony provides a total answer to the application of any good faith exception insofar as the presence of dynamite on the premises was involved. In obtaining and executing the warrant, Swanson was not operating on a strong, subjective belief that he was complying with Constitutional requirements. Rather, he was trying to cover his case. He had no real belief that dynamite was on the premises. However, if he got lucky and found dynamite, he wanted to be able to use it as evidence.

The situation concerning the expectancy that Peak would be found on the premises is identical. Lt. Swanson gives a full explanation of what brought the police to the residence at 2816 Parker Street. He testified that the police had knowledge that Peak, whom they were seeking, was a member of the NCCF. Rice was also a member of that organization. His house had been a periodic meeting place for NCCF members (Federal Court transcript, pages 6-7). Peak was one of the members of that organization who had visited at Rice's house. (Federal Court transcript, page 21).

The police had constructed a list of different places where Peak might be. As Lt. Swanson testifies:

> "At that time we had a list of houses as possibilities, plus getting new addresses from informants . . ." (Federal Court transcript, pages 38-39).

After the search of the NCCF headquarters, the large number of officers who had converged there were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (Federal Court transcript, pages 78-79). As Lt. Swanson described the instructions, there were orders "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (Federal Court transcript, page 32).

The police testimony makes it clear that they did not believe that Peak was at 2816 Parker. Rather, they were conducting searches of a large number of places in the hope that they might find Peak. Thus, Lt. Swanson testifies:

> "Question. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?
>
> Answer. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be." (Federal Court transcript, page 43).

He was specifically queried about information that Peak might have been in Rice's house within the last few days before entry. He testified that:

> "Question: At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?
>
> Answer. I can't recall.
>
> Question. Now, was there anything that you now can recall to tie Duane Peak to the Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of the NCCF, that Peak had been known to go to that house for meetings and otherwise? Now anything else?
>
> Answer. No that was about the information we had." (Federal Court transcript, page 44).

Similarly, both Lt. Pfeffer and Lt. Perry, the other command officers who testified in Federal Court, had no specific information that Peak might be at Rice's house. (Federal Court transcript, pages 71-73; pages 82-83).

Lt. Swanson's testimony demonstrates that the police did not believe that Peak was at Rice's premises. If anyone would have had information linking Peak with those premises, it would have been Swanson, who commanded the intelligence unit. It is clear from Pfeffer's testimony that he had no specific information about a relationship between Peak and Rice, but was merely relying on information provided by the intelligence division. Lt. Perry had seen Peak and Rice together, but that was six months before the event in question, when he served in the intelligence division. (Federal Court transcript, page 83).

The police testimony shows that other probable hiding places of Duane Peak had not been eliminated when Rice's house was searched. Only three prior searches are mentioned. The search of the NCCF headquarters, the search of the home of one of Peak's uncles and a search of Poindexter's home. There is no evidence the police were working through a list of places on the basis of an order of probability. The police did not know where Peak was. They knew he must be someplace. Their strategy was to search everyplace.

On the basis of the foregoing testimony, the Court of Appeals noted that:

> " . . . . The testimony of the various police officers at the evidentiary hearing held before the District Court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that they were acting on nothing more than a hunch or random guess. . . "

Again with regard to the search for dynamite the Court of Appeals states:

> " . . . . Moreover, testimony before Judge Urbom suggests that the purpose of searching for the explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered the dynamite in any of the other locations they had searched earlier in the day." (Emphasis supplied).

The Court of Appeals hald that the State's good faith argument was not only legally invalid, but factually unsupported.

> "We consider it necessary to point out that the record discloses a widespread search for the suspect Peak and Poindexter which have at least a negligent disregard by the Omaha Police for Constitutional rights of not only petitioner but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct condemned in Lankford v. Gelston, supra. We believe this is an appropriate case for the application of the exclusionary rule."

C. THE STATE'S REASONABLENESS TEST AS AN ALTERNATIVE TO THE REQUIREMENT OF PROBABLE CAUSE WOULD RELIEVE THE POLICE OF THE NECESSITY OF JUSTIFYING AN ENTRANCE ONTO PREMISES, AND, THUS, WOULD TOTALLY EVISCERATE THE PROTECTION OF PRIVACY PROVIDED BY THE EXCLUSIONARY RULE. IN ANY EVENT, THE STATE'S ARGUMENT THAT THE POLICE SEARCH HERE WAS REASONABLE HAS NO BASIS IN FACT.

(1)

The State argues that the Exclusionary Rule should be modified so as to judge police conduct of a search by reasonableness under the circumstances, rather than judging reasonableness solely by possession of probable cause vel non.

The point of this argument surfaces from the State's reliance on Warden v. Hayden, 387 U.S. 294 (1967). The State argues that the search here was no more intrusive than that involved in Warden v. Hayden. Hence, the State asks how can the search be condemned. In the net, the State's argument is that the justification for the entry should be ignored, and that a search should only be condemned if the police conduct after entrance is unreasonable.

To state the argument is to refute it. If privacy is to have protection, the zone of privacy must have boundaries. Within the boundaries there is an "expectation of freedom from government intrusion. Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Katz v. United States, 389 U.S. 347, 351-352 (1967), beyond the zone there is no such expectation. Hester

v. United States, supra. The State's argument, that no standard should be applied to judge whether entrance was proper, and that the sole focus should be on what happens after entrance, completely ignores privacy. Once the entrance is made, the sanctuary has been breached. To preserve privacy the initial entrance must require justification.

While the State does not directly make the argument, perhaps it is arguing that some standard less than probable cause should be required as justification for the entrance. The purpose of a search is to find something. The standard of probable cause allows entrance when it is reasonable to believe that the something being sought is on the premises. Carroll v. United States, 267 U.S. 132, 162 (1925). Separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the first clause upon which the State bottomed its argument. The first clause requires searches to be "reasonable." To search where you cannot reasonably expect to find is irrational. To call the irrational reasonable is contradiction.

In cases applying the reasonableness standard, this Court has held that reasonableness must be determined on the basis of a matrix which weighs the governmental interest in entrance against the invasion which the search (1967); Terry v. Ohio, supra 392 U.S. 20-22. The right

invaded a search is the constitutionally protected right to privacy. If the police have no reasonable expectation of finding something, what interest of the government justifies their entrance? The governmental interest is in the police finding what they seek. That interest would only justify going where they could expect to find it.

(2)

In any event, the State's reasonableness argument is devoid of record support. No special circumstances existed in this case which justify the application of a lesser requirement of that of probable cause.

In the court below, the State sought to justify its reasonableness argument by claiming that the police were acting in an emergency situation out of a fear for life and property. As the Court of Appeals noted, that argument was completely refutted by the actual conduct of the police at the time of the search.

> "The conduct of the police upon arrival at petitioner's home, however, errodes the exigent circumstance argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

> The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandate of the Fourth Amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose for searching for explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.
>
> As for the apprehension that Peak was being killed, the delay of more than an hour before entering the house greatly attenuates the force of this argument."

The warrant issued by the magistrate was not issued upon a showing of probable cause to believe dynamite was on Rice's premises. The police possessed no evidence not contained in the affidavit which directly pointed to the presence of dynamite on Rice's premises. The police had no grounds for believing that Peak was hiding on Rice's premises.

Under the evidence in this case, the State's argument for reasonableness reduces to an argument that police may search premises in a situation where neither life nor property is in danger without grounds for belief that either a seizeable person or a seizable thing is on those premises. If that is the reasonableness test which the State seeks to have applied, then whatever the police do is reasonable.

The search for Peak was founded "on nothing more than a hunch or random guess." The search "for explosives was an afterthought . . . because they had not discovered dynamite in any of the other locations they had searched earlier in the day." If conduct is to be judged reasonable, it must be based on reasons. Those reasons must be sufficient given the occasion on which they are advanced to justify the conduct engaged in. Terry v. Ohio, 392 U.S. 1120-22 (1968). Where no emergency exists, where life is not threatened, where property is not in danger, hunch, conjecture, and afterthought do not justify setting at naught human rights specifically protected by the Constitution. As the district court noted in its opinion:

> ". . . The privacy of one's home and the accountability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent of probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home."

II

THE COURTS BELOW CORRECTLY HELD THAT RICE EXHAUSTED HIS STATE REMEDIES ON THE ISSUES OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK.

Having held that the search at 2816 Parker could not be justified by the search, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by the State for the search. In both the State district court and the Supreme Court of Nebraska, Rice had attacked the validity of the search warrant used to justify the search. In each court, the State defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since both the State trial court and the Supreme Court upheld the validity of the warrant, neither court passed upon the alternative justifications for the search. Nevertheless, the District Court held that the exhaustion requirement of 28 U.S.C. Sec. 2254 had been satisfied on this issue. Its holding was affirmed by the Court of Appeals. These decisions on the exhaustion are clearly correct.

This Court has placed the prerequisite of exhaustion on an alternative double aspect. Petitioner may demonstrate satisfaction of the exhaustion requirement either by showing

that the question he seeks to litigate in the federal habeas proceeding has already been presented to the highest court of the state or by showing that he has no clearly available state remedy. On either of these alternative aspects Rice has satisfied the requirement of exhaustion.

The requirement of exhaustion does not require repetitious applications in the state courts, Humphrey v. Cady, 405 U.S. 504, 516 fn. 18 (1972); Wilwording v. Swenson, 404 U.S. 249, 250 (1971). The test for exhaustion is whether the state courts have been given an opportunity to pass upon the issue, not whether they have in fact passed upon it. Picard v. Conner, 404 U.S. 270, 275 (1971). Once there has been presentation, the requirements of the exhaustion test are met. Humphrey v. Cady, supra, 405 U.S. 516, fn. 18. The presentation requirement is satisfied, even though the claim may not have been directly addressed by the state courts. Sanders v. United States, 373 U.S. 1, 16 (1963).

In this case, the alternative justifications for the search were fully briefed and argued in the Nebraska Supreme Court by both the State and Rice. Those issues were not addressed by the Supreme Court of Nebraska because they became superfluous when that court held the warrant valid. Nevertheless, there was full presentation.

Alternatively, it is clear that at the time he filed his petition for habeas corpus, Rice had no available

state remedy. The exhaustion requirement is to be measured as at the time of the filing of the writ. Fay v. Noia, 372 U.S. 391, 435 (1963); Humphrey v. Cady, 405 U.S. 504, 516 (1972). On the date upon which he filed his application for the writ, there was no way in which the alternative grounds for validating the search could have been litigated in the Nebraska courts. So long as the Nebraska courts held the warrant was valid, the presence or absence of exigent circumstances or the validity or invalidity of the search insofar as it could be supported by the arrest warrant for Peak were irrelevant. Even if there were no exigent circumstances and the search could not be justified because of the possession of the arrest warrant, in Nebraska the search was still valid.

The decision by the district court that the search was invalid opened up a new avenue of relief in the Nebraska state courts, if they chose to accept the District Court's decision. However, since that avenue of relief did not exist at the time of filing, it was not an avenue which Rice needed to pursue. Roberts v. Lavallee, 389 U.S. 40, (1967); Francisco v. Gathright, ___ U.S. ___, 42 L.Ed.2d 226, (1974).

CONCLUSION

The District Court and the Eighth Circuit applied well-settled principles of search and seizure law to condemn the search at 2816 Parker as unlawful. The State has presented no grounds for modification of the principles which the lower courts applied. In any event, the State requests no modification of those principles which would alter the outcome in this case. Suppression of the evidence in this case would be required under any of the State's proposed modifications of the exclusionary rule. The writ of certiorati should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of April, 1975 two copies of the Brief For Respondent In Opposition was mailed postage prepaid, to Paul L. Douglas, Attorney General of Nebraska, 2119 State Capitol, Lincoln, Nebraska 68509, counsel for Petitioner. I further certify that all parties required to be served have been served.

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